

Response to Notice of Proposed Rulemaking; request for public comment

Submitted to: Federal Trade Commission, CAN-SPAM Act

Submitted by: UnsubCentral, Inc.

Date: June 26, 2005

Regarding: CAN-SPAM Act Rulemaking, Project No. R411008

Introduction:

UnsubCentral, Inc. is submitting the following comments in response to the FTC's notice of proposed rulemaking regarding CAN-SPAM Act Rulemaking, Project No. R411008. UnsubCentral has provided responses to selected questions in section VII of the notice in which feedback will be most valuable. Selected questions and their respective responses correspond with the numbering pattern in section VII of the proposed rules.

About UnsubCentral

UnsubCentral, Inc. provides email suppression, campaign performance management and consumer preference management solutions to leading advertisers, ad networks, and affiliate networks. The Austin, Texas-based corporation offers solutions that create a secure environment for managing opt-out lists across the enterprise, affiliates and various third parties. Integrated with major affiliate networks and email service providers and reviewed by TRUSTe, the solutions ensure clients comply with the CAN-SPAM Act and data privacy requirements. For more information, please visit www.unsubcentral.com

VII. Questions for Comment on the Proposed Rule

B. Questions on Proposed Specific Provisions

In response to each of the following questions, please provide: (1) detailed comment, including data, statistics, and other evidence, regarding the issue referred to in the question; (2) comment as to whether the proposals do or do not provide an adequate solution to the issues they were intended to address, and why; and (3) suggestions for changes that might better maximize consumer.

1. Section 316.2—Definitions

b. Does the proposed definition of “sender” clarify who will be responsible for complying with the CAN-SPAM Act when a single e-mail contains content promoting or advertising the products, services, or Web sites of multiple parties?

The proposed definition of “sender” does not clarify who will be responsible for complying with the CAN-SPAM Act in many situations in which there are multiple Senders. Further definition of the following requirements is necessary to clarify who will be responsible for complying with the CAN-SPAM Act in all situations. Further,

Clarification of: **“product, service, or Internet website is advertised or promoted”**

Before applying the criteria for messages with multiple Senders as proposed, each party must first satisfy the original CAN-SPAM definition of Sender. The term “sender” is defined as a person who initiates a message and whose product, service, or Internet website is advertised or promoted by the message. However, no guidance is provided on what constitutes being advertised or promoted in a commercial email message.

Below is a list of potential ways that a party may be included in the content of a message. The Commission needs to provide further explanation defining in which of the situations below is a party considered to be advertising or promoting its Internet website.

- Inclusion of the company's name
- Inclusion of text content, preceding or following the advertisement of another Sender, which describes the relationship between a message recipient and the potential Sender/conveyor (See Example 1)
- Inclusion of graphical branding elements associated with the potential Sender/conveyor, which precede, follow, or surround the advertisement of another Sender (See Example 2)
- Inclusion of graphical branding elements and an incentive associated with the potential Sender/conveyor, which precedes, follows, or surrounds the advertisement of another Sender (See Example 3)
- Inclusion of graphical branding elements, an incentive, and a call to action associated with the potential Sender/conveyor, which precedes, follows, or surrounds the advertisement of another Sender

Clarification of: **“controls the content of such message”**

In most list rental situations, both the Seller and the List Owner impose some degree of control over the content of a message. The List Owner may require Seller's content to meet certain specifications, and the Seller's content may be inserted within a message template designed and controlled by the List Owner. The Seller may also have exclusive control over the content it provides to the List Owner as long as the content meets the List Owner's requirements. In such a situation, both parties have some control over the content, but neither party has complete control over the content.

Clarification of: **“determines the electronic mail addresses to which such message is sent”**

Again, list rental situations may occur where both the List Owner and the Seller have some control over determining the addresses to which a message is sent. The Seller may determine if the message is sent to all the List Owner's addresses, a specified number of the addresses, a specified subset of the addresses (e.g. recipient addresses in the state of New York), or not to send to any of the List Owner's addresses. However, the List Owner does not allow Sellers complete access to view individual addresses, only aggregate information about the list. Therefore, only the List Owner can determine the individual addresses to which a message is mailed. In this situation, both the List Owner and the Seller may have some control, but not complete control, over determining the electronic mail addresses to which such message is sent.

Should the proposed definition be modified? If so, how?

Further guidance regarding what constitutes being advertised or promoted in a commercial email message is necessary to determine what parties are designated to be a Sender.

Further guidance defining what it means to “control the content of” a message is necessary to apply the criteria provided in the proposed revision to the definition of the term “Sender.”

Further guidance defining what it means to “determine the electronic mail addresses to which such message is sent” is necessary to apply the criteria provided in the proposed revision to the definition of the term “Sender.”

Do the proposed criteria provide adequate guidance to establish who is the sender when there are multiple advertisers?

See above response.

d. Should the Commission adopt a “safe harbor” with respect to opt-out and other obligations for companies whose products or services are advertised by affiliates or other third parties? If not, why not? If so, what would be appropriate criteria for such a safe harbor?

The Commission should not adopt a “safe harbor” with respect to opt-out and other obligations for companies whose products or services are advertised by affiliates or other third parties. The relationship between a company and what is referred to as an “Affiliate” in the online marketing industry is one where the advertising company agrees to pay the affiliate for responses or sales resulting from that email advertisement. Aside from the payment structure, this relationship is no different than a company renting a mailing list from a third party. Therefore, the same requirements for compliance should apply to the party or parties deemed as Senders.

4. Section 316.4—Prohibition Against Failure To Honor Opt-Out Requests Within Three Business Days of Receipt

a. Is three business days an appropriate deadline for effectuating an opt-out request? If not, what time frame would be more appropriate? Does the Commission’s proposal that multiple advertisers in a single commercial email message may arrange to have only one of those advertisers be the “sender” affect what time frame would be appropriate? If so, how?

Three business days is an appropriate deadline for effectuating an opt-out request.

Difficulties effectuating an opt-out request may occur in large organizations where independent divisions send commercial email under the same brand. An opt-out request received by one division must be honored in mailings sent by all other divisions. Therefore, data management processes must be put into place to communicate the opt-out request to all divisions sending commercial email and allow for the suppression of the recipient’s address in mailings sent by the independent divisions.

While the implementation of such data management processes may result in difficulties for large organizations, the costs of a data management solution and the time necessary for implementation are not excessive. Data management applications that allow companies to comply with the three-day deadline are inexpensive and widely available. UnsubCentral is one such vendor that provides a low-cost application for the timely management of opt-out requests across multiple divisions of an organization.

c. Some commenters indicated that there are several software products on the market that can effectuate opt-out requests almost immediately. Are such products widely or currently used by email senders? Are these products affordable for small entities? What are the costs and benefits of using such products?

While it is true that there are several products that can effectuate opt-out requests almost immediately, these products are typically a component of a larger email marketing management system. If an organization has multiple independent divisions, as described in the above response, and each division uses a separate email management system, effectuating opt-out requests immediately becomes significantly more difficult. However, the type of product solution described in the above response will allow a Sender to easily meet a three-day deadline. The UnsubCentral application is used by approximately one hundred online advertisers and is easily affordable for both large and small companies.

d. What specific technical procedures are required to suppress a person’s email address from a sender’s directory or distribution list? What are the specific time requirements and costs associated with those procedures? What, if any, manual procedures are required to suppress a person’s e-mail address from a sender’s directory or distribution list? What, if any, costs are associated with the manual suppression of e-mail addresses? How do such costs compare with costs associated with electronic processing? What, if any, circumstances would require manual processing of optout requests? How prevalent is the use of manual procedures to suppress

people's e-mail addresses from a sender's directory or list? What are the characteristics of senders that use manual procedures to process opt-out requests? What are the characteristics of senders that use electronic procedures to process opt-out requests? Do small entities process opt-out requests manually or electronically?

No response.

e. In marketing agreements involving the use of third parties, what typically is the role of each third party in processing an opt-out request? For example, who typically receives the optout request and how? If the opt-out request must be transferred to a third party, how is that transfer accomplished, and how long does such a transfer typically take? Once an optout request is received by the third party, what procedures are involved in effectuating the opt-out request, and how long do such procedures typically take?

In marketing agreements involving the use of third parties, there are typically two parties – the advertiser and the publisher (affiliate). When a publisher sends an email message to its subscriber list promoting the advertiser, the advertiser is commonly determined to be the “sender” of the message.

To comply with receiving opt-out requirements, the advertiser provides an opt-out link with the content of the message to be sent. When message recipients click on the opt-out link, they are directed to a website page that collects the recipient's email address and opt-out request. The submitted email address is immediately added to a centralized suppression list containing all the advertiser's opt-out requests.

To comply with honoring opt-out requirements, all addresses on the advertiser's opt-out suppression list must be removed from the publisher's mailing list prior to sending the message. In order to avoid data privacy risks, a neutral third party is often used to perform this list cleansing process. Each party uploads their lists to the neutral third party, and the third party returns a cleaned list to the publisher. Another frequently used method of protecting data privacy during the list cleaning process is to encrypt lists into MD5 format before sharing with a third party.

f. Should there be time limits on the duration of opt-out requests? Why or why not? Does the CAN-SPAM Act give the Commission authority to limit the time opt-out requests remain in effect? If so, how?

A time limit should be put in place for honoring opt-out requests in order to allow for the archiving of outdated data. Without restricting the amount of time an opt-out request must be honored, a company's opt-out suppression list will continue to grow larger as long as that company does business. For some large organizations who have invested heavily in marketing and customer communication programs, suppression lists have already reached in excess of fifty million records in size. Over time, these suppression lists will grow to sizes that make email marketing programs cost prohibitive.

6. Aggravated Violations Relating to Commercial E-mail

c. Are there practices that contribute substantially to the proliferation of unlawful commercial e-mail messages and are not already prohibited by the Act?

Ironically, one practice prompted by the CAN-SPAM Act is now contributing substantially to the proliferation of unlawful email messages. Third party list cleansing requirements have lead to many consumers receiving more unsolicited email as a direct result of requesting to opt-out from a Sender.

In situations where a seller pays a third party list owner to send a promotional email on the seller's behalf, all addresses on the sellers opt-out suppression list must be removed from the list owners mailing list prior to delivery. It is common practice for many sellers to post a text version of their opt-out suppression lists on Blind Affiliate Networks, allowing easy access for any list owner who is a member of that network to download a copy.

While the purpose of posting suppression lists on affiliate networks is to comply with CAN-SPAM Act opt-out requirements, suppression lists are often downloaded and used to compile other unsolicited email lists. Therefore, a consumer who opts-out of receiving email from such a seller may afterwards receive MORE unsolicited email as a direct result of making an opt-out request.

A number of methods are available to allow for cleansing third party lists without risking the privacy of suppression list data. Such methods are used by an estimated ten to fifteen percent of email marketers, but the majority of marketers take little or no precautions to protect the privacy of opt-out data. Estimate is drawn from a sample including UnsubCentral clients only.

To contact UnsubCentral in regards to this response to proposed rulemaking, please direct inquiries to:

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